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Supreme Court of the United States

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, Individually and in his Official Capacity as Acting Tax Commissioner for the State of West Virginia, *Appellant*,

v.

UNITED ARTISTS CORPORATION, a Corporation.

REPLY BRIEF FOR APPELLANT TO BRIEF FOR APPELLEE.

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Foreword

The purpose of this brief being to reply to that filed for appellee, we will, for the sake of clarity and convenience, discuss rather categorically the particular points advanced by appellee in its brief and to the pages thereof on which the subject matter may be found.

Appellee's Statement of the Suit.

On page 1 of appellee's brief, it is stated that the tax is based upon the gross receipts of appellee derived from distributing motion picture films to exhibitors in West Virginia. Reference to Section "First" of the contract (R. 14A-14B) reveals that the income of ap-

pellee paid to it by West Virginia exhibitors *is for the right to exhibit or use the films in West Virginia.* No mention is made in the contract of payments for the mere act of distributing said films.

Appellee's Statement of the Case.

It is stated on page 2 of appellee's brief, with reference to the applications of the exhibitors which later become the contracts, that "such applications are in the form of offers for the use of the films for a specified period, sometimes for a specified sum, sometimes for a stipulated percentage of the gross box office receipts therefrom." This is more nearly a true statement of the purpose for which payments are made by exhibitors to appellee. Such are for the use of the films—not for the mere act of distribution.

On page 3 of appellee's brief, the statement is made that "appellant, the State Tax Commissioner, claims the right to collect from the appellee a tax of one per cent of the gross proceeds received by the appellee for supplying films to West Virginia exhibitors." We again state that the mere supplying of films is not that for which appellee is paid, but the payment is made for the use of the films after they have been supplied. We pointed out in our brief that no provision of the contract specifies that the films be supplied in any certain manner, whether by intra or inter state commerce.

Appellee's Contention That It Is Not Doing Business In West Virginia.

On page 5 of appellee's brief it is asserted that the contract is made in New York; that appellee in shipping the films makes delivery thereof to the exhibitor in New York; that appellee receives the films in New York when returned to it there; and under the contract collects its

income in New York. From this, appellee concludes that so far as this case is concerned New York is the only place in which it is collecting income or doing business. We pointed out in our brief (p. 26) that the mere formation of the contract would not serve to place appellee's activities within the protection of the commerce clause, and it is our view that irrespective of the provisions of Section "Fifth" (2) of the contract (R. 14A-14B) making delivery to a common carrier, etc., delivery to the exhibitor, and the fact that the exhibitors in many instances send their remittances direct to appellee in New York does not, for the practical purposes of taxation, and in view of other more determinative facts, constitute New York as the place in which appellee is exercising the taxable privilege of collecting incomes from the use of its property in West Virginia. We have understood appellee's contention to be that the tax sought to be imposed would place an unlawful burden on interstate commerce—not that the tax would be an attempt to exercise extraterritorial jurisdiction by the State of West Virginia. It appears to us that should the State of New York attempt to tax appellee relative to this income arising in West Virginia from the use of its films there, such would be an attempted exercise of extraterritorial jurisdiction by New York, and we daresay that appellee could successfully resist the payment of such a tax.

On page 5 of appellee's brief, the statement is made that "appellant argues that he is attempting to tax the local business of exhibiting films and collecting box office receipts from customers who pay to see the films; * * *. Such local business is the business of an exhibitor, not of a distributor; it is the business of operating a theater; * * *." We do not believe this Court will be confused, as appellee apparently is, by the use in our brief of the terms "local exhibition" and "local activity." It is

apparent that such are used only with respect to the relationship which the activities of appellee in West Virginia, in and about the collection of rentals from the use of its films there, bear thereto. We do not attempt to say that the business of appellee is that of an exhibitor or that appellee is in the business of "operating a moving picture show" or "theater" in West Virginia; but we do say, and to set at rest any doubt which could arise by reason of any statement made in our brief which might possibly lack clarity, that the local activity which we seek to tax is broadly that within the terms of the statute, to-wit: of collecting incomes in the State of West Virginia from the use of its property in said State. We conceive that irrespective of the procedure appellee follows relative to the collection of such incomes, whether it take the form of exercising a marked degree of control over the actual showing of the films or otherwise, that so long as its activities relative to the collection of such incomes are local; the State can tax. If to accomplish these purposes, it controls a part of a broader activity, taxable as a whole under another provision of law, such does not prevent appellee being taxed on account of the privilege it exercises. The immediate purpose of appellee is to secure its rents and profits from the use of its films. Throughout our brief, we attempted to point out that the exhibition of the films in West Virginia is an activity purely local in character carried on after interstate commerce for all practical purposes had ended; that it is this local exhibition in which appellee is immediately concerned and with reference to which it exercises the privilege we seek to tax. Its activities may well aid and promote the local exhibition, but such are solely for the purpose of securing to appellee its rentals or fees from the use of such films. We contend, and are pleased to note that appellee admits, that the exhibition of films is a taxable local activity. It cannot be denied

but that appellee is vitally interested in that local activity and exercises a marked degree of control and authority over the same for no other purpose than to secure its rents, profits and royalties from the use of the films, hence, we think it logically follows that the exhibition being local the activities of appellee concerning that local exhibition may also be deemed to be local. Surely it cannot be successfully contended that when appellee controls to a marked degree a part of a broader activity which may be local as a whole, in order that it may reap benefits from the exercise of a certain privilege, that it is exempt from the payment of taxation for this privilege exercised by reason of the fact that the larger and broader activity is also subject to a privilege tax. There can be no doubt but that one in doing a particular kind of business or exercising a particular privilege may, in numberless instances, in and about the protection of his interests therein, control to a certain degree a part of a related activity which in itself may be taxable under proper statutes.

Appellee, after arguing that because of our position that it exercises control over what we term the "local exhibition" of the films, argues that "local exhibition" as used in that sense is "operating a theater" in West Virginia. It may well be that with respect to a certain state of facts the term "local exhibition" might be synonymous with the term "operating a theater". Nevertheless, we submit that the matter depends entirely upon the sense in which the term "local exhibition" is used. We are concerned in this case with the use of motion picture films and the collection of rentals therefor after such films have arrived in the State of West Virginia; the packages in which they are contained have been broken; said films then being placed in the projection machines in theaters and flashed upon the

screens. "Operating a theater" is indeed much broader than the term "local exhibition" when used in this connection. "Operating a theater" requires a great outlay of capital; a place permanent in nature in which to make the "local exhibition"; the employment of many people; involves the care, comfort and safety of the public viewing the "local exhibition" and numerous other activities and items of capital outlay and expense. The actual exhibition of a film is but one of the many things which constitutes "operation of a theater". Appellee then proceeding upon the false premise that "local exhibition" as used in our brief, with respect to the connection between such and appellee's business of collecting its rents and royalties from the use of its films, is in effect "operating a theater", argues that the activity is taxable under Section 2 (g) of the Act here involved, which section is set forth on page 6 of appellee's brief. It is true that said section taxes every person engaging or continuing in the State of West Virginia in the business of operating a theater, opera house, moving picture show, etc., the tax being based upon the gross receipts from such businesses. Hence, appellee concludes that if its activities are taxable at all, the same are taxable under Section 2 (g), and argues that the State of West Virginia having already exacted its tax from the local theater owners and operators under said section, based upon their gross receipts, that appellee cannot be taxed relative to the rentals it receives from its films for the reason that every cent received by the exhibitor has already been taxed for a privilege. We fail to see the logic of appellee's argument. The tax imposed under the Act here involved is upon the privilege of engaging in certain businesses, the gross income being merely the measure of the tax. The thing taxed is the privilege exercised. If appellee's argument in this respect were carried out, no other conclusion could be arrived at but that

a person operating a motion picture show in West Virginia having once paid his tax based upon the gross receipts from that business would thus automatically exempt every person furnishing to the exhibitor some service in aid of the exhibition, from being taxed for the privilege thus exercised in furnishing such service. For example, the exhibitor in West Virginia might rent the building in which he carried on his activity. Certainly such would not exempt the owner of the building from a proper payment of taxes for the privilege he exercises relative thereto, merely because it might be conceived that the gross receipts of the theater owner, which had been used as a basis for taxation, might be paid the owner of the building for such rentals. Furthermore, it might well be that the theater owner rents a projection machine. Would the person who owns the projection machine and exercises the privilege of receiving rents and royalties therefrom in West Virginia be exempt from taxation on that privilege? We believe not. It certainly might well be that the owner of the building and the owner of the projection machine would impose upon the theater owner certain restrictions and obligations relative to the use thereof, which in effect would control to a marked degree the activities of the theater owner in the conduct of his business respecting such property, but for that reason the owner of the building or the owner of the projection machine would not be engaged in "operating a theater." Likewise, is the appellee in receiving rents and royalties from the use of its films by the theater owner, by reason of the fact that in order to secure its rents and royalties it exercises a marked degree of control over the theater owner relative to the exhibition thereof, to be considered for the purposes of taxation to be "operating a theater"? Are appellee's incomes from the use of said films to be exempt from proper taxation by the State of West Virginia merely because the theater owner has

paid a tax for the privilege he exercises based upon his gross receipts when the theater owner may possibly pay some of those gross receipts to the appellee for the use of its films? These are separate privileges, and, taxation being a practical matter, it appears to us that no other practical conclusion can be arrived at other than to the effect that the business of "operating a theater" is separate and distinct from the business of receiving rents and royalties for the use of property even though that property may be used with respect to the operation of the theater, and the owner thereof may to a substantial degree exercise control over the operation of the theater.

On page 8 of appellee's brief, it is stated that it has no control over the films after they leave New York, *other than the right to insist that they be used and returned in accordance with the terms of the contract of lease.* We pointed out in our brief (pages 5-8 and 18-21) some of the outstanding terms of this contract. We again respectfully submit that under the terms thereof appellee is locally engaged in a taxable privilege. Appellee states at page 8 of its brief that nothing is done by it in connection with the films in West Virginia *"other than to promote their use"*. Certainly a broad and comprehensive statement. It appears to us that such "promotion" and use in West Virginia, in the manner allowed and provided for by said contract, is of such magnitude as to make the "promotion", in West Virginia, appellee's entire business of any sort; that "promotion" is indeed vital to it in and about the collection of its rentals.

Appellee's Contention That It Is Engaged In Interstate Commerce.

Appellee, on page 11 of its brief, after reference to the case of *Binderup* v. *Pathe*, 263 U. S. 291, and other cases wherein the same is cited, states that "it is im-

conceivable that it can be seriously argued that film distribution is not interstate commerce". We do not argue that the act of transporting the films from New York or some other place outside West Virginia to exhibitors in this State, and reshipment from this State to another State, is interstate commerce. That is pure distribution. We do deny that appellee's activities sought to be taxed are interstate commerce. Pure distribution is incidental to the local activity which takes place after the films have come to rest in West Virginia, and it is only with reference to such local activity that the instant tax is sought to be imposed. Appellee states on page 12 of its brief "the sole function of the distributor is to supply the films, and that function is completed when the films are delivered to the exhibitor by transportation without the State." We readily admit that if such is the sole function of appellee, West Virginia cannot tax, but the contract in this case and the facts surrounding same, do not even tend to support this statement. If, as contended, the sole function of the appellee is merely the supplying of films by an act of interstate transportation, why is it that appellee has taken such a deep interest in the films after that act of transportation has ended? No other argument can be sustained but that it is the use of the films after transportation has ended in which appellee is interested. It appears to us that "distribution" and "supplying" indicate acts in the nature of pure transportation, whereby all duties regarding or interest in the article distributed or supplied would end upon the termination of transportation. In this case, the termination of transportation marks the beginning of appellee's supervision over and interest in the use of the article "distributed" or "supplied".

We are pleased to note that at page 13 of appellee's brief it is stated: "The act of exhibiting films is intra-

state commerce and taxable by states under applicable statutes." We assume that appellant there refers to exhibition in a broad sense as being comparable to the activity of a motion picture theater owner. If so, there can be no reason why an activity carried on by some other person which aids or even is apart of such exhibition cannot be taxed by West Virginia if the privilege exercised thereby is one covered by the tax statute in question.

Appellee's Statement That the Tax Is An Invalid Burden On Interstate Commerce.

On page 17 of its brief, appellee again agrees that the exhibition of its films in West Virginia is a local activity which can properly be taxed by the State, but says that exhibition is not the business of appellee. We, of course, contend that the theater owner, in operating his theater, is doing a local business, but the exhibition of appellee's films in those local theaters is a part of the business of operating a theater. Appellee's control of the act of exhibiting the film is for the purpose of assuring its proper income from that act of exhibition, and in so doing it has and is concerned purely with a local activity; hence is locally engaged in the business of collecting incomes from the use of personal property in this State. After all, it makes little difference by what process it achieves its purposes, whether it be by controlling the actual exhibition of the films, or by control of some other activity connected with the showing of its films. It is the control and supervision of an activity carried on in the State of West Virginia by which appellee exercises its taxable privilege of collecting incomes from the use of its property.

Conclusion

It is believed that all other points or arguments advanced by appellee in its brief have been fully met by our brief, and we again respectfully submit that the judgment appealed from should be reversed.

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